71-1658

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No.

SEABOARD COAST LINE RAILROAD COMPANY,
a foreign corporation, *Petitioner,*

vs.

RAYMOND L. MCDANIEL, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT STATE OF FLORIDA

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT STATE OF FLORIDA

Petitioner[1] prays that a Writ of Certiorari issue to review the Judgment of the District Court of Appeal, First District, State of Florida, entered in this cause on October 21, 1971 and rendered on November 18, 1971.

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[1]Petitioner was Defendant in the trial court and Appellant in the District Court of Appeal, First District, below.

CITATIONS TO OPINIONS BELOW

The Opinion and Judgment of the District Court of Appeal, First District, State of Florida, dated October 21, 1971, and rendered on November 18, 1971, and here sought to be reviewed, is printed in Appendix M hereto and is reported at 254 So.2d 15. The Final Judgment of the Circuit Court of the Fourth Judicial Circuit, In and For Duval County, Florida, dated July 1, 1970, which was affirmed by the Judgment here sought to be reviewed, is printed in Appendix J hereto and is not reported. The Order of the Supreme Court of Florida, dated March 24, 1972, denying a Petition for a Writ of Certiorari to review the Judgment of the District Court of Appeal, First District, State of Florida, is printed in Appendix O hereto and is reported at 260 So.2d 517.

JURISDICTION

The Judgment of the District Court of Appeal, First District, State of Florida, was dated October 21, 1971 and rendered on November 18, 1971. Thereafter, in an effort to exhaust all possible state court remedies, Petitioner timely filed a petition for a writ of certiorari to the Supreme Court of Florida seeking the review of the Judgment of the District Court of Appeal, First District. The Supreme Court of Florida denied the petition for a writ of certiorari on March 24, 1972. (260 So.2d 517, Appendix O hereto).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3).

Raymond L. McDaniel, the Respondent herein, brought this suit in the Circuit Court of Dade County, Florida, under the Federal Employers' Liability Act (FELA) 45 U.S.C. §§51-60 and the Boiler Inspection Act and Safety Appliance Act, 45

U.S.C. §§ 1-51. At the Petitioner's request the case was transferred to the Circuit Court of Duval County, Florida. Plaintiff charged the Defendant with negligence with regard to an accident occurring on September 6, 1967 and with a violation of the Boiler Inspection Act and Safety Appliance Act in connection with an accident which occurred on July 31, 1968. Petitioner filed its Answer denying the allegations of the Complaint, and alleging that, as to the Plaintiff's claim under the Federal Employers' Liability Act, the Plaintiff was guilty of negligence contributing in whole or in part to his injuries and to the extent that his negligence contributed or resulted in part in his injuries, Plaintiff's damages should be diminished in accordance with the degree of negligence attributable to him. The trial court directed a verdict against Petitioner as to the question of Plaintiff's contributory negligence. Petitioner contended that the issue of the Plaintiff's contributory negligence was one for the jury's consideration, based upon interpretations of the FELA by Federal courts and other state courts, and the trial court overruled Petitioner's contentions in that regard. On appeal to the District Court of Appeal of Florida, First District, that Court affirmed the lower court and recognized the argument Petitioner set forth, but failed to apply that law to the facts of the case and in fact failed to agree that such was the law. The Court merely stated as follows:

> "Appellant argues strenuously that the same standards of negligence and causal relationships applicable to support a claim of railroad liability under the Federal Employers' Liability Act apply in the consideration of the employee-plaintiff's contributory negligence. . . . In short, Appellant argues that since the decisions construing the liability of the railroad in FELA cases require minimal proof of actionable negligence on the part of the employer, a like standard must be utilized

> in evaluating evidence of contributory negligence on the part of the injured employee."
>
> 254 So.2d at 16; Appendix M hereto, p. 30a.

After failing to recognize which standard was to be applied, the Court nevertheless proceeded to evaluate the evidence, obviously under Florida common law.

Furthermore, Petitioner expressly asserted at the trial that the Federal Employers' Liability Act precluded the application of the Florida Standard Jury Instructions and common law to a suit brought under the Act. The evidence affirmatively showed that Respondent was suffering from mental and emotional problems which were the cause of his condition and his continuing disability, and the trial court instructed the jury with a Florida Standard Jury Instruction rather than an instruction based upon interpretation of the FELA by Federal courts and other state courts. On appeal to the District Court of Appeal of Florida, First District, that court in affirming the lower court in the giving of the Florida Standard Jury Instruction, stated ". . . that Plaintiff's damages were [not] limited to those which he could prove were proximately caused by the Defendant's negligence," (254 So.2d at p. 17; Appendix M hereto p. 31a.) and that the trial court did not err in applying the Florida law.

The decision of the District Court of Appeal of Florida, First District, sustained the validity of the Florida common law and the Florida Standard Jury Instruction in the trial of this case even though repugnant to the Federal Employers' Liability Act as construed by other Federal and state courts.

QUESTIONS PRESENTED

1. Was there evidence in the record of contributory negligence sufficient to preclude a directed verdict in Respondent's favor and to require submission of that issue to the jury for determination?

2. Does the Florida Standard Jury Instruction concerning aggravation of a preexisting condition, as promulgated by the Supreme Court of Florida for use in trials in Florida, correctly state the applicable law under the Federal Employers' Liability Act?

STATUTES INVOLVED

The following statutes are involved:

1. The Federal Employers' Liability Act (FELA), 45 U.S.C. § 51:

> *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees*

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in

part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

2. The Federal Employers' Liability Act, 45 U.S.C. § 53: *Contributory negligence; diminution of damages*

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

STATEMENT OF THE CASE

Raymond L. McDaniel, the Respondent, brought this suit in the Circuit Court of Dade County, Florida, under the Federal Employers' Liability Act. The Complaint alleged two accidents, the first occurring on September 6, 1967, and the second occurring on July 31, 1968. With regard to the second accident, the Boiler Inspection Act and Safety Appliance Act were also alleged to be applicable. (A-1a-3a). At the Petitioner's request the case was transferred to the Circuit Court of Duval County, Florida. (A-4a).

The Complaint claimed damages for injuries allegedly sustained in Waycross, Georgia, while Respondent was employed by the Petitioner as a switchman, on two occasions. The first injury was alleged to have occurred on September 16, 1967 at night while the Respondent was riding upon a box car which collided against another railroad car, throwing him to the ground. Respondent charged the Petitioner with negligence as follows:

> "a) In furnishing the plaintiff a dangerous and unsafe place to work.
>
> b) In failing to provide the plaintiff with a reasonably safe place to work.
>
> c) In negligently operating and controlling the car upon which plaintiff was riding at the time of the subject accident.
>
> d) In negligently failing to give proper and adequate signals and warnings of switching operation.
>
> e) In operating the cut of cars upon which plaintiff was riding at an excessive rate of speed."

The second accident allegedly occurred on July 31, 1968,

also during the hours of darkness, when the Respondent attempted to board Engine No. 25 and the grab iron which the Respondent was utilizing for the purpose of boarding the engine gave way, causing him to fall to the ground. The Complaint charged the Petitioner with negligence as follows:

> "a) In furnishing the plaintiff a dangerous and unsafe place to work.
>
> b) In failing to provide the plaintiff with a reasonably safe place to work.
>
> c) In negligently maintaining its engine in that the grab iron on said engine was not fastened properly."

The Complaint charged the Petitioner with a violation of the Safety Appliance Act and Boiler Inspection Act in the second accident.

The Petitioner filed its Answer denying the negligence alleged in the Complaint, denying that it violated the Safety Appliance Act and Boiler Inspection Act, and alleging that, as to the Respondent's claim under the Federal Employers' Liability Act, the Respondent was guilty of negligence contributing in whole or in part to his injuries and to the extent that his negligence contributed or resulted in part in his injuries, Respondent's damages should be diminished in accordance with the degree of negligence attributable to him. (A-32, 33).

The trial of this cause commenced on June 29, 1970, before a jury and was concluded on July 1, 1970, when a verdict of Sixty-Seven Thousand Five Hundred ($67,500.00) Dollars was returned for the Respondent and against the Petitioner, Seaboard Coast Line Railroad Company. Judgment was thereafter entered on the verdict.

On July 13, 1970, Petitioner, Seaboard Coast Line Railroad Company, filed its Motion for Judgment in accordance with Motion for Directed Verdict or, in the alternative, Motion for New Trial or, in the alternative for a Remittitur. (A-18a-27a). This Motion was denied by the trial court by Order, filed July 20, 1970 (A-27a).

Petitioner appealed to the District Court of Appeal of Florida, First District, seeking reversal of the Final Judgment on both grounds here asserted. The District Court of Appeal heard oral argument on June 22, 1971, and thereafter by its opinion filed October 21, 1971 (Appendix M hereto, p. 28a; 254 So.2d 15), affirmed the Final Judgment, and denied Petitioner's Petition for Rehearing on November 18, 1971 (Appendix N hereto, p. 32a).

In an effort to exhaust all possible state court remedies, Petitioner filed a timely petition for a writ of certiorari with the Supreme Court of Florida seeking review of such judgment. The petition for certiorari was denied on March 24, 1972 (Appendix O hereto, p. 33a; 260 So.2d 517).

STATEMENT OF FACTS

On September 6, 1967, the Respondent, Raymond L. McDaniel, was employed by the Petitioner as a switchman in its yard at Waycross, Georgia, and had been employed by the Petitioner in that position for twenty-two years. At approximately 11:30 o'clock P.M. on that date, Respondent was assigned to a crew that was to uncouple three freight cars from the rear of Train No. 96 which had stopped at the Waycross Passenger Station. The switch engine, being operated by Respondent's crew, coupled up to the three freight cars. With Mr. McDaniel in position on the northeast corner of the second car, the engine moved southward, and the plan

was to uncouple the cars from this engine and allow them to roll into one of the tracks near the Waycross freight house. The engine was to increase speed and go into a track referred to as 97-Y. The conductor was riding the footboard of the engine passing signals to the engineman as to when the engine should speed up and when the cars were to be uncoupled and allowed to roll into one of the tracks. The cars entered Track No. 1 and struck other freight cars standing in Track No. 1, resulting in Mr. McDaniel's being thrown off the car, landing on his feet on the ground.

Following the accident on September 7, 1967, Dr. Samuel Victor examined the Respondent and described his injuries as "contusion left elbow and spine." Mr. McDaniel returned later that day and was x-rayed by Dr. Neal F. Yeomens, a radiologist. Dr. Yeomens found no evidence of fracture or dislocation. After x-rays were made, Respondent was allowed to return to duty, and he worked his regular assignment until October 23, 1967, when he was held out of service due to complaints with pain in his neck, headaches, and difficulty with his vision. Dr. Victor continued to see him with regard to his complaint concerning "distance and timing." Dr. Victor was of the opinion that the Respondent's problem was an emotional reaction rather than any true organic problem. He was sent to Dr. James G. Lyerly in Jacksonville for neurological consultation, and it was Dr. Lyerly's opinion that Respondent's problems were mostly a functional nervous disorder with some hysterical manifestations. He attributed the slight fuzziness of vision and blurred vision to a nervous tension basis. Mr. McDaniel returned to work November 6, 1967.

On July 31, 1968, Respondent was involved in another accident which occurred in approximately the same location, and interestingly enough, involved the same movement as

the first accident in which the crew was going to get the freight cars from the rear of Train No. 96. Mr. McDaniel was on the left side of Engine No. 25, which was the north side. He had aligned the switch for the unit to move from the freight house track to the passenger station track. The other switchman was on the right side of the unit and signaled the engineman to move forward. After aligning the switch, Mr. McDaniel took a few steps in a westward direction in order to get on the front step of Unit No. 25 as it passed. When he reached for the grab iron, he testified that the grab iron came loose and that he was thrown off balance, resulting in his falling from the step to the ground, landing on both feet. He testified that he continued to hold to the grab iron, resulting in injury to his neck and shoulders. The crew foreman was up at the station at the time the accident allegedly occurred, and he testified that Mr. McDaniel told him about the broken grab iron but that he did not tell him that he was injured. When the crew knocked off from work, Mr. McDaniel went home and took a shower and then called his union chairman, advising him of the accident, and it was the union chairman who took Mr. McDaniel to the hospital.

Following the second accident, Mr. McDaniel was again examined by Dr. Victor, who described his injuries as a "minimal contusion of the back of the neck and the lower back." He also found Mr. McDaniel to be "anxious and apprehensive." Dr. Yeomens x-rayed Mr. McDaniel on August 1, 1968, and he found no evidence of fracture or dislocation. Respondent was allowed to return to work on September 5, 1968, but he said that he was unable to work and stayed out of service. The Respondent saw Dr. Seymour Morse, an orthopedic surgeon in Jacksonville, having been referred to Dr. Morse by his attorney. Dr. Morse testified that he found no pertinent objective findings and that he was of the opinion that Mr. McDaniel had a severe problem

in motivation and that further treatment may be warranted in the field of psychotherapy for improvement of motivation.

Mr. McDaniel was returned to work in January, 1969. He had another accident in January, 1969, after working approximately two weeks. He was seen again by Dr. Victor but was not permitted to return to work without further examinations. Arrangements were made for Mr. McDaniel to be examined by Dr. Adney K. Sutphin, Chief Medical Officer of the Seaboard Coast Line Railroad Company, and that examination was made in Jacksonville on February 13, 1969. Dr. Sutphin made a complete examination. He stated that his impression was that Mr. McDaniel was consciously malingering or experiencing a severe conversion hysteria. His best professional opinion was that it was malingering. Arrangements were then made for Mr. McDaniel to have consultation with Dr. William H. McCullagh, a psychiatrist in Jacksonville, and Mr. McDaniel was examined by Dr. McCullagh on February 28, 1969. It was Dr. McCullagh's conclusion that Mr. McDaniel was suffering from a depressive reaction, an emotional depression, a condition which was activated by the Plaintiff's personal and marital problems. Dr. McCullagh's report indicated that Mr. McDaniel's disability was not the result of any injury on the railroad, and Mr. McDaniel was not approved to return to duty after March 7, 1969.

ARGUMENT AND REASONS FOR ALLOWANCE OF THE WRIT

Point 1

WAS THERE EVIDENCE IN THE RECORD OF CONTRIBUTORY NEGLIGENCE SUFFICIENT TO PRECLUDE A DIRECTED VERDICT IN RESPONDENT'S FAVOR AND TO REQUIRE SUBMISSION OF THAT ISSUE TO THE JURY FOR DETERMINATION?

Petitioner submits that the Federal courts and other state courts would answer the above question in the affirmative, contrary to the decision and judgment of the Florida court, and that the Writ should be granted.

This is a case arising under the Federal Employers' Liability Act (FELA), 45 U.S.C.A. §§ 51-60. There are two accidents involved in the case, the first occurring on September 6 ,1967, and the second occurring on July 31, 1968. With regard to the second accident, the Boiler Inspection Act and Safety Appliance Act, 45 U.S.C.A. §§ 1-51, were also applicable.

As to Respondent's claim under the Federal Employers' Liability Act, the Petitioner raised the defense of contributory negligence. At the close of all the evidence, the Court directed a verdict in Respondent's favor and against the Petitioner with regard to the defense of contributory negligence. Respondent's counsel made full advantage of that turn of events at the beginning of his closing argument, when he proclaimed to the jury:

> "Ladies and gentlemen, during your recess the Court has met with the lawyers in the case and has made certain rulings of law.
>
> ". . . [T]he railroad had a defense in the case that Mr. McDaniel's negligence himself, his failure to look

out for himself, caused or contributed to causing the accident and the injury.

"At this point in the case the Judge has ruled under the evidence presented before him and before you there is no evidence whatsoever as to Mr. McDaniel's failure to act properly under the circumstances, so the railroad's defense as to this accident involving the cut of cars has been stricken . . ."

The Court also refused to give to the jury Petitioner's Requested Instruction No. 5, concerning contributory negligence. (A-106)

Petitioner submits that the trial court erred in directing a verdict on the issue of contributory negligence and in refusing to give the requested instruction under the FELA. The decision of the District Court of Appeal of Florida, First District, in affirming the trial court is in direct conflict with and repugnant to decisions of the Federal courts and other state courts which set forth the minimal proof of negligence required to support a claim of contributory negligence under the FELA. As strange as it may seem, the issue raised is a relatively new question, as pointed out by Judge John R. Brown in *Page v. St. Louis Southwestern Railway Co.*, 349 F. 2d. 820 (U.S., 5th Cir., 1965), where he stated at page 823 as follows:

> "Attesting again to the marvels of an advocative system which, grinding out the thousands of FELA cases in State and Federal appellate courts, nevertheless after a half century's experience under the Act still leaves new questions, this problem is very, very fresh, the materials of decision are scarce, and the score now stands 1 to 1. . . ."

Under the Federal Employers' Liability Act, the contributory negligence of the Plaintiff diminishes the recovery in proportion to the amount of negligence attributable to the

employee. See 45 U.S.C.A. § 53. As will be pointed out subsequently, the law concerning the sufficiency of evidence required in the Plaintiff's case against the railroad is the same standard of causation which applies to the Plaintiff's own negligence.

What evidence is considered "sufficient" to support a recovery against the railroad under the FELA?

This Court dealt with the question in *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 448, 1 L.Ed.2d 493, where the following is said with reference to the FELA:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities . . ."

Is the *Rogers* standard the same standard of causation which applies to the Plaintiff's own negligence?

In the case of *Page v. St. Louis Southwestern Railway Co.*, supra, Judge Brown dealt with this question. In that case, the plaintiff employee urged that the standard of causation

imposed upon the railroad "was in the *Rogers* theme of negligent acts playing any part, no matter how slight, in bringing about the injury," but that the standard was not the same as to contributory negligence. The Court stated at page 822 as follows:

> ". . . As between the injured worker and the Railroad, he [plaintiff] thinks that is a fine and fair charge. But not so, he says, when it comes to judging causation as to asserted contributory negligence of the Employee. Here he wants the good old-fashioned dialectic of proximate causation with all of its built-in metaphysical concepts of natural and unbroken sequence, but for, foreseeability of harm and the like."

The Court, however, held that from a substantive point of view, "we think that from the very nature of comparative negligence, the standard of causation should be single." (See page 824).

In two cases decided the same year as the *Page* case, supra, two other courts came to the same conclusion as the Fifth Circuit. In *Ganotis v. New York Central Railroad Co.*, 342 F. 2d. 767 (U.S., 6th Cir., 1965), the Sixth Circuit Court of Appeals stated at pages 768 and 769 as follows:

> ". . . We do not believe that the Act also intended to make a distinction between proximate cause when considered in connection with the carrier's negligence and proximate cause when considered in connection with the employee's contributory negligence. If it had so intended, express words to that effect could easily have been used . . ."

A similar finding was made by the District Court for the Eastern District of Pennsylvania in the case of *Mumma v.*

Reading Company, 247 F. Supp. 252 (U.S., E.D.Pa., 1965). In the *Mumma* case, the Court said at page 254 as follows:

> ". . . . [T]he sufficiency of the evidence to take the issue of contributory negligence to the jury is to be tested by the same standards that are used to test the sufficiency of plaintiff's evidence on the issues of negligence and proximate cause. . . . Tested by these standards, there was sufficient evidence, although it was extremely meager, to permit a finding of contributory negligence in the accident of January 4, 1964."

The Petitioner contends that the lower courts did not apply the *Rogers* standard to the Respondent's negligence, however meager in the courts' opinion the evidence of that negligence may have been. In fact, the District Court of Appeal, First District, never actually recognized that the *Rogers* standard applies to an employee's negligence. The court only stated as follows:

> "Appellant argues strenuously that the same standards of negligence and causal relationships applicable to support a claim of railroad liability under the Federal Employers' Liability Act apply in the consideration of the employee–plaintiff's contributory negligence. . . . In short, appellant argues that since the decisions construing the liability of the railroad in FELA cases require minimal proof of actionable negligence on the part of the employer, a like standard must be utilized in evaluating evidence of contributory negligence on the part of the injured employee. (254 So.2d at 16; Appendix M hereto, p. 28a).

Without holding that Petitioner's argument stated the applicable law under the FELA, the Florida appellate court

nevertheless proceeded to evaluate the evidence of contributory negligence under Florida common law, referring to "a legion of cases" in Florida (254 So.2d at p. 16; Appendix M hereto p. 30a), and found no negligence as a matter of law in Florida. If the trial court had applied the law in *Rogers* and *Page*, it would have allowed the jury to decide the question of contributory negligence based upon the requested instruction. It is for that purpose Petitioner is applying to this Court.

What was the evidence of negligence on the part of Plaintiff in this case?

The Respondent in his own testimony at the trial laid the groundwork for showing that it was up to the jury to determine whether Respondent was guilty of contributory negligence, no matter how small, that may have played any part in bringing about the injury complained of. The accident occurred at approximately 11:30 p.m. on September 6, 1967 during a switching move at Waycross, Georgia. In Respondent's own words, "we was supposed to come up behind this train, No. 94, 96 – they changed the name or the number along there somewhere, but we were supposed to come get behind it, get the cars of merchandise for the freight house at Waycross, get up behind it and spot it at the freight house." The accident occurred after the crew obtained three cars from the rear of train number 96 and as they were moving the cars to the freight house. There is evidence in the record upon which the jury could have found: (1) that Respondent negligently failed to use the brake at his disposal to stop or slow down the cut of cars as it was his job to do; (2) that Respondent negligently failed to realize sufficiently in time that he would have to use the brake to stop the cut of cars prior to the collision; (3) that Respondent negligently placed himself in a position where his visibility was unnecssarily limited in the direction the move was going.

The evidence is as follows:

(1) *That Respondent negligently failed to use the brake at his disposal to stop or slow down the cut of cars as it was his job to do.*

Respondent described his function on the move as follows:

> "MR. BECKHAM: What was your particular job as a member of that crew?
>
> "A: I was supposed to climb up on the end of the car and tie the handbrake and stop the cars when they got by the engine, far enough to clear, so we could come back and get around them with the engine and shove them down and spot them at the platform." (A-7a).

And further:

> "MR. GABEL: Mr. McDaniel, as far as this 1967 incident, as I understand it you intended to take the three cars from the rear of the 94 or 96, whatever it was at that time, the same train, and spot them at the freight house; it that correct?
>
> "A: That's correct." . . . (A-8a).
>
> "MR. GABEL: Now, I believe you said that each of the freight cars had a handbrake; is that true?
>
> "A: Yes.
>
> "MR. GABEL: And would it be safe to say that your function was to use the brake and slow the cars down and stop them by the freight house?
>
> "A: That was the job that I was supposed to do; yes, sir, after they cleared the switch that Alvin Gordon threw." . . . (A-8a).

"MR. GABEL: And I believe you said that your function on the cut of cars was to control the movement of the cars as far as braking or stopping the cars; is that true?

"A: That's right." (A-10a).

Respondent's apparent excuse for not using the handbrake, as it was his job to do, was that he did not realize he needed to until a few seconds before he hit the cars ahead. The jury certainly had evidence enough in the record to find that Respondent negligently failed to use the brake, but an alternative finding leads to the Petitioner's second point.

(2) *That Respondent negligently failed to realize sufficiently in time that he would have to use the brake to stop the cut of cars prior to the collision.*

The Respondent's attorney asked the Respondent several times on direct examination questions designed to elicit testimony to the effect that Respondent did not know which track the cut of cars would be placed on and that he found out which track he was on only seconds before the collision.

See the following excerpts:

"MR. BECKHAM: Did you know at the time that you were riding the cars which track that switchman was actually going to push them into?

"A: I did not; no, sir." . . .

"MR. BECKHAM: When did you find out what track the cars were going into?

"A: Just a few seconds before they hit." . . . (A-7a).

"MR. BECKHAM: How many tracks were there available to the switchman at that point, to put you in?

"A: There was three tracks, but I was supposed to have gone in track 3." . . .

"MR. BECKHAM: All right. Now, where were you when you first learned or realized which track you were going into?

"A: I must have been about, maybe a quarter length or a little further from those cars that I hit. I knew I was supposed to go in track 3.

"MR. BECKHAM: What track did you actually go into?

"A: I went in track 1." (A-7a-8a).

On cross-examination, evidence was presented from the Respondent upon which the jury could have found that Respondent knew that track number 3 was not clear and that track number 1 was the only place he could have been sent. The cross-examination consisted of the following questions and answers:

"MR. GABEL: And in this case you knew that track 3 and track 2 were not clear; did you not know that?

"A: I knew that after I hit.

"MR. GABEL: I refer to your deposition which was taken on May 5, 1970 at which time you were under oath and your attorney was there, page 46, and ask you if you gave this answer to this question:

'Question: Where were you heading and what were you going to do?

'Answer: We had to come down this track 1, which is the main line, and somewhere in this vicinity here, the foreman was supposed to have pulled a pin and let the engine go. In this special case, track 3 wasn't clear and track 2 wasn't clear, and earlier in the evening, I had put three piggy-back cars in track 1 and there was approximately one car length in the clear.

'So Mr. Gordon, he got off and was supposed to line the switch. Well, there's a B&WY switch right here too.'

"MR. GABEL: Did you not give that answer to that question? . . .

"A: Can I clear that up?

"MR. GABEL: I am just asking you if you gave that answer to that question.

"A: That is what I said; yes, sir.

"MR. GABEL: Well, let me ask the questions, and you tell me if you said it. If your lawyer wants to ask you some more, he can.

"But at that time you were under oath and you said that; is that correct?

"A: At that time, if that is on that paper, that is what I said." . . . (A-8a-9a).

"MR. GABEL: And you also knew that track number 1 was the only place the switchman could send you, because that's where you had the most room; is that true?

"A: Ask that question again, now.

"MR. GABEL: That track number 1, that you knew track number 1 was the only place that the switchman could send you –

"A: Did I say it was the only –

"MR: GABEL: – because that was where you had the most room?

"A: The cars in track 1 were approximately the same distance that the cars in track 2 were, but the cars in track 2 were not clear of track 3 where I was supposed to have gone.

"MR. GABEL: The question I asked you was did not you know that track number 1 was the only place the switchman could send you?

"A: No, sir.

"MR. GABEL: I refer to your deposition again on page 49.

"A: I didn't understand the question.

"MR. GABEL: I ask you if you gave this answer to this question:

> 'Question: Well, you said you had put some piggyback cars in track 1?
>
> 'Answer: In track 1. That was where you had the most room. That's the only place that he could send them where he could put them without tearing the side off the car on these cars that was in 2 here.

"MR. GABEL: Did you not give that answer to that question; just yes or no.

"A: It sounds like I did." . . . (A-9a-10a).

With the quoted portions above from cross-examination, it is clear that when the Respondent stated that he did not realize which track he was going into until shortly before impact, the jury could have found that he was being inattentive to the situation which he knew existed, since he had placed cars in track number 1 himself, and since the jury had evidence that he knew, or should have known, that the cars were going in track number 1, he did not realize his situation as he should and did not use the brake as he should.

The jury certainly could have found that the Respondent was in a position to realize his situation and also in a position to do something about his situation, and that the failure on his part to act was contributory negligence.

(3) *That Respondent negligently placed himself in a position where his visibility was unnecessarily limited in the direction the move was going.*

The Respondent testified that he was stationed between the second and third cars from the engine. He also said that there was a brake on the end of each car where he was. He testified that there was not a brake on the lead end of the cars, but by inference there should have been a brake at the trailing end of the leading car in the movement. Respondent was, however, a full car length behind that point. He stated in his testimony as follows:

"MR. GABEL: As you were coming into the track, you were two full car lengths from the lead end of the cars; in other words, you were on the back of the second boxcar?

"A: That's right.

"MR. GABEL: And, therefore, your visibility was limited in front; was it not?

"A: It was, in the direction we were going." (A-154-155).

Based upon this testimony, the jury could have found that the Respondent's visibility would have been better at another location if in fact he needed to see which direction the cut of cars was going so that he could use the handbrake which he was holding to stop or slow down the car prior to the collision which allegedly caused his damages.

In a case very similar factually to the case at bar, *Matthews v. Atchison, T. & S.F. Ry. Co.*, 129 P.2d 435 (Cal., 2d D.C.A., 1942), the court said at page 440 that the question of contributory negligence was for the jury. In the *Matthews* case the plaintiff was a switchman who was injured in much the same way as the plaintiff in the instant case. The plaintiff in *Matthews*, along with another switchman and an engine foreman, were switching a number of cars in a railroad yard at night. Plaintiff was directed by the engine foreman to ride a car destined for a track designated as No. 3, and to use the hand brake to stop it when it got "into the clear" on the track to which it was switched. "Into the clear" meant that the car was far enough from the entrance to the track so that it would not interfere with the movement of cars on adjacent tracks. Before the car got "into the clear" on Track 3 it ran against other cars which were on that track and stopped suddenly. Plaintiff had just started to set the brakes. He had his right hand on the brake and was holding one of the steps of the ladder on the car with his left hand. The sudden impact injured him. One favorable distinction in *Matthews* is that no one told the plaintiff there was not room on Track 3 to allow the car he was riding to go into the clear. In the

instant case the Respondent knew that the tracks involved had other cars in them.

Based upon the testimony cited above, it is Petitioner's contention that the jury could have found the Respondent's actions to be negligence, in Federal Employers' Liability Act terms, which may have played some small part in causing the injury complained of. If that is the case, then the law is clear that it was error to direct a verdict in Respondent's favor on the contributory negligence defense and to refuse Petitioner's instruction concerning contributory negligence.

Point 2

DOES THE FLORIDA STANDARD JURY INSTRUCTION CONCERNING AGGRAVATION OF A PREEXISTING CONDITION, AS PROMULGATED BY THE SUPREME COURT OF FLORIDA FOR USE IN TRIALS IN FLORIDA, CORRECTLY STATE THE APPLICABLE LAW UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT?

Petitioner submits that the Federal courts and other state courts have answered the above question in the negative and that the Writ should be granted.

The trial court gave the following instruction from the Florida Standard Jury Instruction, 6.2b:

> "Also, you should consider any aggravation of an existing disease or physical defect or activation of any such latent condition, resulting from such injury. If you find that there was such an aggravation, you should determine, if you can, what portion of Plaintiff's condition resulted from the aggravation and make allowance in your verdict only for the aggravation. However, if

you cannot make that determination or if it cannot be said that the condition would have existed apart, you should consider and make allowance in your verdict for the entire condition." (15a).

In Petitioner's Requested Instruction No. 11, the last sentence is replaced by the following sentence:

"The Plaintiff is not entitled to recover for damages which would have resulted from his previous condition without the aggravation." (12a).

The evidence affirmatively showed that the Respondent was suffering from mental and emotional problems which were the cause of his condition and his continuing disability. The "aggravation" instruction which was read to the jury from the Florida law was improper for an FELA case.

The instruction read by the Court was adapted from *C. F. Hamblin, Inc. v. Owens,* 172 So.694 (Fla., 1937). In that case, a hardware store clerk fell from a ladder, setting in motion a dormant germ in plaintiff's leg that resulted in plaintiff's leg being amputated. The instruction given by the court in the instant case, based upon the *Owens* case, supra, is certainly the Florida law; however, it is not applicable in the instant Florida Employers' Liability Act situation.

The correct position was taken in *Matthews v. Atchison, T. & S. F. Ry.,* supra, where an injury to a railroad switchman's arm aggravated an abnormal condition of the elbow. The Court held damages must be limited to damage that resulted from aggravation. In a case very similar to the present case, *Shupe v. New York Central System,* 339 F.2d 998 (U.S., 7th Cir., 1965), the court specifically said that plaintiff cannot recover damages in an FELA suit which are not proximately caused by defendant's alleged negligence and that the plaintiff has the burden of proving what portion, if any, of the alleged loss of future earnings was caused by

the injury where there is a pre-existing condition to be aggravated.

Petitioner submits that in the present case, where Respondent did not prove that Petitioner caused the continuing disability, but apparently relied upon the theory that the Petitioner only aggravated his pre-existing condition, the rule cited above should apply, and the court erred in instructing the jury based upon the Florida law and not upon the law of the Federal courts and other state courts in FELA cases.

CONCLUSION

The action of the District Court of Appeal of Florida, First District, in failing to follow the controlling decisions of the Federal courts and other state courts in the interpretation of a Federal statute and in creating confusion and conflict in the decision law under that statute, provides this Court with jurisdiction to review the decision below. For the reasons set forth above the petition for a writ of certiorari should be granted and on further hearings on the merits the decision of the District Court of Appeal of Florida, First District, in this case should be reversed and the case remanded for new trial.

Respectfully submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Petition for a Writ of Certiorari to the District Court of Appeal, First District, State of Florida, has been furnished to Beckham & McAliley, 1010 Concord Building, Miami, Florida 33130, and Horton & Schwartz, 410 Concord Building, Miami, Florida 33130, Attorneys for Respondent, by United States Mail this 20th day of June, 1972.

GEORGE D. GABEL, JR.